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Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

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JAMES R. STRINGER

PETITIONER

VERSUS

LEE ROY BLACK, COMMISSIONER,
Mississippi Department of Corrections

RESPONDENT

=====

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Where The Court Below Has Held That This Court's Decision In Clemons v. Mississippi, Creates A New Rule And Therefore Has No Application In Petitioner's Federal Habeas Petition, Certiorari Should Be Denied.

II. Where the State Supreme Court held the claim relating to the "especially heinous" aggravating circumstance to be procedurally barred and this bar was recognized by the United States District Court, the fact that the Court of Appeals addresses the merits of the claim does not waive the bar. The claim remains procedurally barred and therefore certiorari should be denied.

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BRIEF IN OPPOSITION

Respondent, Lee Roy Black, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). A copy of this opinion is before this Court as Exhibit A to the petition for certiorari. The earlier opinion of the Court of Appeals in this case prior to remand

by this Court is reported as Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988). A copy of this opinion is before the Court as Exhibit B to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1254(1). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment VIII and Amendment XIV.

STATEMENT OF THE CASE

A. FACTUAL HISTORY

The conviction and sentence of death arise out of the June 21, 1982 armed robbery and murder of Ray McWilliams and his wife Nell in their home. Petitioner, his son and several others went to the McWilliams' home to rob them of a large amount of cash and jewels supposedly kept there in a safe. The brutal facts of this crime are graphically and sufficiently set forth in the opinion of the Mississippi Supreme Court and we would adopt them as our statement of facts here. Stringer v. State, 454 So.2d 468, 471-473 (Miss. 1984).

B. PROCEDURAL HISTORY

Petitioner was indicted for capital murder by the grand jury of the Circuit Court of Hinds County, Mississippi, First

Judicial District, during the July 1982 Term of said court. Petitioner's trial was conducted during the September 1982 Term of said court before a properly empaneled jury. After hearing the evidence and being fully instructed as to the law the jury returned a verdict of guilty of capital murder. The trial then proceeded to the issue of sentence. At the conclusion of the sentencing phase of the trial the jury returned a sentence of death in proper form, finding that the following aggravating circumstances existed:

We the jury, unanimously find that the aggravating circumstances of:

1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

2. The capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant.

3. The capital murder was especially heinous, atrocious or cruel.

Tr. 1435.

After trial, but prior to the perfection of the direct appeal in this case, a Petition for Writ of Error Coram Nobis was filed in the Circuit Court. After an evidentiary hearing was conducted on this petition it was denied. An appeal was taken to the Mississippi Supreme Court challenging the conviction of capital murder and the death sentence and the denial of the petition for writ of error coram nobis. On his

automatic appeal to the state supreme court petitioner raised the following claims:

On direct appeal:

1. The Court erred in allowing the District Attorney to cross examine the appellant about his unwillingness to submit to a lie detector test, over the objection of counsel and in admitting into evidence an agreement between the district attorney's office and the witnesses, Brock and Medders to have their version of the events corroborated by a lie detector test, this admission into evidence although not objected to at the time is plain error under the rules of this Court.

2. It was highly improper and prejudicial for the Trial Court to permit the state to question the defense witnesses, Tammy Williams, and the defendant, James Stringer, about what drugs they had used or were using and to allow into evidence against the defendant a weapon concealed in his boot at the time of his arrest which bore no relation to the crime.

3. Appellant was deprived of effective assistance of counsel.

4. The Court erred in allowing the District Attorney to ask and elicit an answer from the defense witness, Tammy Williams, that she had been "charged" with conspiracy to commit murder and accessory after the fact.

5. The appellant respectfully submits that this case should be reversed if for no other reason that on the basis of the entire record, taking all errors and prejudicial matter into consideration, the defendant was deprived of a fair trial.

On error coram nobis appeal:

1. The court erred in allowing the witness Walter Owens, III to invoke the Fifth Amendment.

2. The court erred in not allowing defense counsel to amend his petition to include the destruction of the tape.

Stringer v. State, 454 So.2d at 479, 480.

These two appeals were consolidated and heard together. On July 11, 1984, the Mississippi Supreme Court unanimously affirmed the conviction and sentence of death entered by the Hinds County jury and also affirmed the denial of coram nobis relief. A petition for rehearing was filed and the original opinion was modified on denial of the petition for rehearing on August 15, 1984. Stringer v. State, 454 So.2d 468 (Miss. 1994). This modification did not disturb the affirmance of the conviction and death sentence.

Stringer then petitioned this Court to grant a petition for writ of certiorari to the Mississippi Supreme Court. This petition stated as its Questions Presented the following claims:

1. Was petitioner denied effective assistance of counsel in violation of the 6th and 14th Amendments?
2. Did cross examination about refusal to take a polygraph test offend the 5th and 14th Amendments?
3. Did refusal to instruct jury during the penalty stage of capital trial that jury could grant mercy even if the aggravating circumstances outweigh mitigating circumstances offend the 8th and 14th Amendments?
4. Where persons who expressed reservations about the death penalty improperly excluded [sic] from the jury in violation of the 6th and 14th Amendments?
5. Did the state courts erroneously conclude that the evidenced fully supported the findings of statutory aggravating circumstances in violation of the 8th and 14th Amendments?

Petition for Writ of Certiorari.

The State responded. In due course the petition was denied by this Court on February 19, 1985. Stringer v.

Mississippi, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985).

Petitioner then filed a Motion To Vacate Or Set Aside Judgment And Sentence with the Mississippi Supreme Court in compliance with Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1988), raising numerous claims. On January 15, 1986 the Mississippi Supreme Court denied post-conviction relief with a written opinion. Stringer v. State, 485 So.2d 274 (Miss. 1986). A petition for rehearing was denied on April 9, 1986.

Petitioner then filed a petition for writ of certiorari from this denial of post-conviction relief claiming:

Was petitioner denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution where his trial attorney refused to present mitigation testimony from family members at the penalty phase of his capital trial because the trial attorney believed such testimony might compromise the defense of petitioner's son, who was also charged with capital murder for the same offense and who was represented by the same trial attorney?

This petition was denied on October 20, 1986 by this Court. Stringer v. Mississippi, 479 U.S. 922, 107 S.Ct. 327, 93 L.Ed.2d 300 (1986). The Mississippi Supreme Court then, on motion of the State, reset an execution date for petitioner.

In response petitioner filed a petition for writ of habeas corpus and motion for stay of execution with the United States District Court for the Southern District of Mississippi. A stay of execution was entered on January 12,

1987 by the District Court. On November 20, 1987, after conducting an evidentiary hearing, the District Court entered its Memorandum Opinion and Order denying relief on all issues. Stringer v. Scroggy, 675 F.Supp. 356 (S.D. Miss. 1987). A motion to alter or amend under Rule 59(e) was timely filed. This motion was denied with a five page written opinion on January 22, 1988. This opinion is unpublished. Stringer v. Scroggy, Civil Action No. J87-0015(B). Petitioner filed a notice of appeal and applied for a certificate of probable cause. The district court granted the requested certificate of probable cause.

Petitioner then pursued his appeal to the Court of Appeals for the Fifth Circuit. Briefs were filed and oral argument was had. On December 22, 1988 the Fifth Circuit issued its opinion affirming the denial of relief by the district court. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988). A petition for panel rehearing and a suggestion for rehearing en banc were filed. These petitions were denied on January 20, 1989. Petitioner was granted a stay of the mandate in order to file his petition for writ of certiorari with this Court challenging the decision of the court of appeals.

On certiorari to this court from the decision of the Fifth Circuit petitioner presented three questions. These questions read:

1. Whether the Fifth Circuit erred in failing to find that an instruction requiring the jury to unanimously find mitigating circumstances before considering them

violates this Court's holding in Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860 (1988).

2. Whether a United States Circuit Court of Appeals can automatically uphold a death sentence imposed after consideration of an unconstitutionally vague aggravating circumstance despite a state law requirement that the jury weight the statutory aggravating circumstances against all mitigating circumstances in determining the appropriate sentence.

3. Whether the Fifth Circuit Court of Appeals erred in holding that the trial court's refusal to grant a life option instruction did not result in a mandatory sentence of death by improperly limiting the jury's discretion.

Petition at i.

On April 16, 1990, this Court issued the following order:

The motion for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Clemons v. Mississippi, 494 U.S. ___ (1990).

Stringer v. Black, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990).

On remand to the Fifth Circuit for further consideration, petitioner presented two issues to the court of appeals. He presented the Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), issue and renewed his claim under Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. ___, 110 S.Ct. 1227 (1990).

On July 30, 1990, the Fifth Circuit issued its opinion on remand. The Court reinstated its prior affirmance of the denial of habeas relief holding that Clemons represented new

law and would not be applied retroactively to petitioner's case. The court of appeals did not address the Mills/McKoy argument on remand. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). The petition for rehearing and suggestion for rehearing en banc were denied on September 10, 1990. The mandate in this case was issued instanter on July 30, 1990. The Court refused to recall this mandate.

While this case was pending in the Fifth Circuit the petitioner filed a second and successive state post-conviction petition with the Mississippi Supreme Court raising these same issues. Petitioner requested that the Fifth Circuit stay proceedings while this Court considered the present petition. The Fifth Circuit refused to stay consideration of the issues presented on remand while the Mississippi Supreme considered whether it would entertain this second the petition. This petition is still pending before the Mississippi Supreme Court.

REASONS FOR DENYING THE WRIT

Petitioner has presented no claim to this Court that is in a procedural posture to be addressed. Further petitioner presents no cognizable claim under the Constitution of the United States and therefore certiorari should be denied.

ARGUMENT

I. Where The Court Below Has Held That This Court's Decision In Clemons v. Mississippi, Creates A New Rule And Therefore Has No Application In Petitioner's Federal Habeas Petition, Certiorari Should Be Denied.

When the Court below reconsidered this case in light of Clemons v. Mississippi, it found:

Stringer's conviction was final on February 129, 1985 when the Supreme Court denied his petition for writ of certiorari directed at his conviction and sentence. Stringer v. Mississippi, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985). At panel of the Fifth Circuit has recently held that claims raised under Clemons and Maynard are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under Teague. Smith v. Black, 904 F.2d 950, (5th Cir. 1990).

We therefore reinstate our previous judgment. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988). The judgment of the district court denying the writ is AFFIRMED.

990 F.2d at 111.

In order to find the reasons underpinning the decision by the Fifth Circuit we must look to the decision in Smith v. Black, 904 F.2d 950 (5th Cir. 1990). The Smith v. Black decision was entered on June 26, 1990, and the petitions for rehearing and rehearing En Banc were denied on August 24, 1990.

The court below held that this Court "limited for the first time Mississippi's practice of supporting a death sentence on the basis of a remaining, valid aggravating

factor." 904 F.2d at 983. Judge King's analysis is clear and correct in holding that Clemons represents new law in that is not available to petitioner in a federal post-conviction setting. The opinion of the court below correctly applies the constitutional standard to the question at hand. Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. 2822, 109 L.Ed.2d 193 (1990); Saffle v. Parks, 494 U.S. ___, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Butler v. McKeller, 494 U.S. ___, 101 S.Ct. 1212, 108 L.Ed.2d 347 (1990). A look at the opinion of the Fifth Circuit will be helpful as it would be hard to embellish on the excellent analysis found there. After looking at the opinion in Clemons, the court below held:

Saffle's reading of Lockett and Eddings stressed that "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision," and noted that rules regarding "how [the jury] must consider the mitigating evidence" were not within the ambit of those cases. ___ U.S. at ___, 110 S.Ct. at 1261; see also Sawyer v. Smith, ___ U.S. ___, ___, 110 S.Ct. 2822, 2828, 111 L.Ed.2d ___ 193 (1990) ("general proposition[s]" divined from Lockett and Eddings insufficiently determinative for Teague test, aff'g Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc). Mississippi's practice neither addresses what factors the jury may consider, nor, in fact, any consideration by the jury at all; the jury in Smith's case, per instance, was free to consider any statutory or non statutory mitigating evidence it chose. Mississippi has simply developed a practice as one component of its review process that ignores invalid aggravating circumstances for the sake of valid ones.

Not until Clemons v. Mississippi did the United States Supreme Court specifically apply Godfrey and Maynard to the Mississippi aggravating circumstance, and before that application it could at least be said that the constitutional practice of Mississippi's redemptive status was ambiguous, making reasonable for Teague purposes the rule preceding Clemons. See Butler, ___ U.S. at ___, 110 S.Ct. at 1217; Saffle, ___ U.S. at ___, 110 S.Ct. at 1260-61. In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir.) (dicta), cert. denied, 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987), Edwards v. Scroggy, 849 F.2d 204, 211 n.7 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 597 (1989), and most recently in Stringer v. Jackson, 862 F.2d 1108, 1113-15 (5th Cir. 1990), which the Supreme Court has vacated and remanded for consideration in light of Clemons v. Mississippi, see ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990), various panels of this court have sustained death sentences premised in part on an invalid aggravating circumstance by recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance. Under this practice, perhaps first represented in Evans v. State, 422 So.2d 737, 743 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 314 (1983), the Mississippi Supreme Court typically would recognize the problematic constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance, possibly review the sentence for proportionality and under the Coleman limiting construction of the circumstance, and uphold the sentence if in any event the jury had found at least one other valid aggravating circumstance. See, e.g., Pinkney v. State, 538 So.2d 329, 355-58 (Miss. 1988), vacated and remanded for further consideration in light of Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed. 931 (1990); Lanier v. State, 533 So.2d 473, 491 (Miss. 1988) (alternative holding; sentence vacated on other grounds); Lockett v. State, 517 So.2d 1317, 1336 (Miss. 1987) (alternative holding), cert. denied, 487 U.S. 1210, 108 S.Ct. 2858, 101

L.Ed.2d 895 (1988); **Johnson v. State**, 511 So.2d 1333, 1336-39 (Miss. 1987) (alternative) rev'd sub nom. **Johnson v. Mississippi**, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); **Stringer v. State**, 500 So.2d 928, 944-45 (Miss.1986); **Irving v. State**, 498 So.2d 305, 314 (Miss. 1986) (alternative holding), 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987); **Edwards v. State**, 441 So.2d 84, 92 (Miss. 1983) (alternative holding; sentence vacated on divided opinion; **Tokman v. State**, 435 So.2d 664, 670 (Miss. 1984) (alternative holding), cert. denied, 467 U.S. 1256, 104 S.Ct. 3527, 82 L.Ed.(1984).

This practice relied in part on decisions of the Supreme Court subsequent to **Lockett** and **Eddings** (and subsequent by a matter of months to the point at which Smith's conviction became final) that might with hindsight be read as anticipating **Clemons**, but at the time might have appeared to confirm the constitutionality of the Mississippi practice. **Zant v. Stephens**, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), upheld a death sentence administered under the Georgia sentencing scheme when one of the three aggravating circumstances found by the jury was subsequently held invalid by the Georgia Supreme Court while the other two aggravating circumstances were specifically upheld. Although the opinion recognized the potential difference attending a "weighing" state, id. at 873 n.12, 890-91, 103 S.Ct. at 2741 n. 12, 2750, the chief import of the decision was often viewed as confirming the constitutional latitude afforded the common state practice of redeeming death sentences when more than one aggravating circumstance was present, and **Zant** was relied upon by this court and the Mississippi Supreme Court in warranting the Mississippi practice. See, e.g., **Stringer v. Jackson**, 862 F.2d at 113-14; **Lanier v. State**, 533 So.2d at 491; **Lockett v. State**, 517 So.2d at 1336; **Johnson v. State**, 511 So.2d at 1336-39; **Stringer v. State**, 500 So.2d at 944-45; **Irving v. State**, 498 So.2d at 314.¹⁶ Similarly, while the plurality opinion in **Barclay v. Florida**, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), might have suggested a reservation

regarding certain circumstances in "weighing" states, see id. at 954 n. 12, the opinion also noted that Florida, like Georgia, "requires the sentencer to find at least one valid aggravating circumstance before the death penalty may even be considered," id. at 954, 103 S.Ct. at 3427, and ultimately upheld the Florida scheme. Finally, **Maynard v. Cartwright** left to Oklahoma the redetermination of sentence and recognized the possibility that the court "would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence." 486 U.S. at 365, 108 S.Ct. at 1860.

To the extent that these cases contain reservations distinguishing schemes like that administered by Mississippi, it cannot be said that such distinctions represented legal determinations that control the outcome of Smith's case, and certainly not so for the law applicable at the time his conviction became final. The Supreme Court explicitly acknowledged at a time prior to that date that it would not distinguish between functionally similar sentencing schemes, even if the differences would obviate the potential distinctions marking a "weighing" state. See **Franklin v. Lynaugh**, 487 U.S. 164, 108 S.Ct. 2320, 2331 n. 12, 101 L.Ed.2d 155 (1988) (citing **Adams v. Texas**, 448 U.S. 38, 46, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)); see also **Stringer v. Jackson**, 862 F.2d at 1115 (opining that there is "no difference, other than on in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence in instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence"). Of the large number of cases which have enforced a practice such as that of Mississippi, the majority have ignored fine distinctions among the various states's capital schemes. [Citations omitted.]

Rather than allowing the federal judiciary a means of reneging on its commitment to the proposition that there is no "one right way for a State to set up its

capital sentencing scheme," *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), the *Teague* doctrine in part tolerates the diversity of state schemes by accepting the fact that various jurisdictions will not always correctly anticipate the ultimate constitutional significance of every detail. Instead, "reasonable, good-faith interpretations of existing precedents" are sufficient to prevent application of new law. *Butler* 110 S.Ct. at 1217; see also *Sawyer v. Smith*, ___ U.S. at ___, 110 S.Ct. at 2828-29 (incorrect characterization of Supreme Court precedent by Mississippi Supreme Court further indicates extent to which subsequent constitutional ruling was not dictated.) We hold, consequently, that the application of *Clemons* to *Smith* would involve the application of a "new rule" on collateral review, a practice normally barred by *Teague*.

¹⁶ *Butler's* observation regarding the retroactivity of judicial rhetoric is surely appropriate to any effort to locate the distinctions of *Clemons* in *Zant*. In *Johnson v. Mississippi*, for example, the Court stressed its "specific[] reli[ance]" in that case on the admissibility of evidence at the sentencing hearing, 486 U.S. 578, 590, n.9, 10 S.Ct. 1981 n. 9, 100 L.Ed.2d 575 (1988), a characterization of *Zant* that by itself might well warrant affirming *Smith's* sentence.

904 F.2d at 984-986.

Clearly, the Fifth Circuit applied the proper constitutional standard when analyzing whether or not *Clemons* represents new law. There was close adherence to the teachings of *Butler* and *Saffle*. The decision in *Clemons*, setting forth limitations on Mississippi's practice of supporting a death sentence on the basis of the remaining,

valid aggravating factors was not dictated by prior precedent of this Court.

Even though the question of whether or not *Clemons*, is new was answered in a manner against petitioner's position, that did not end the inquiry. As it was required to do, the Fifth Circuit continued its analysis to determine whether or not *Clemons* represented a decision that fell into one of the two exceptions to the application of *Teague v. Lane*, 489 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Since, the decision in *Clemons* would not decriminalize a class of conduct nor would it prohibit the imposition of capital punishment on a particular class of individuals the first exception would not have any application to *Stringer's* case. *Smith*, 904 F.2d at 986.

Looking to the second exception the Fifth Circuit held:

The second exception is for those rare "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the criminal proceeding. See *Saffle*, ___ U.S. at ___, 110 S.Ct. at 1263; *Butler*, 110 S.Ct. at 1218. As the en banc court noted in *Sawyer v. Butler*, 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), aff'd, sub nom. *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), this exception is tailored to those rules designed to redress constitutional violations which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact; s disposition of the case," and does not include procedurally flawed contemplation or review of relevant evidence. As the Supreme Court recently observed in *Sawyer v. Smith*, "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing

is directed toward the enhancement of reliability and accuracy in some sense," but Teague's second exception is limited to "watershed" rules affecting "bedrock procedural elements." ____ U.S. at ____, 110 S.Ct. at 2931. The rule on which Smith would rely is not such exalted stature.

Because we conclude that a necessary component of Smith's claim that the use of the "especially heinous" aggravating circumstance in his sentencing phase was barred by Teague, we do not consider whether that claim has been procedurally barred or has merit.

904 F.2d at 986-987.42

This analysis is correct. In Clemons, the Court stated that on remand the Mississippi Supreme Court could preform a reweighing of the aggravating and mitigating circumstances or it could perform a "harmless error analysis" and affirm a death sentence in the fact of an invalid aggravating circumstance. The fact that the appellate court is allowed to perform a harmless error analysis to a Clemons error demonstrates that it is not the "watershed" or "bedrock procedural elements" spoken of in Teague. The Court has usually cited Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as an example of the type rule that comes within this exception. It cannot be said that Clemons or Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) either one come within this exception.

Petitioner, in a supplemental brief, further contends that Parker v. Dugger, ____ U.S. ____, 59 U.S.L.W. 4082 (January 22, 1991), represents the retroactive application of Clemons to a

case on federal post-conviction review. The simple answer to this claim is that the bar found in Teague, was never interposed as a defense by the State of Florida in Parker. Collins v. Youngblood, 497 U.S. ____, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) makes clear that Teague is not jurisdictional and a court need not raise the Teague bar on its own motion. While there is no requirement that a court raise Teague non-retroactivity, there is no prohibition to it doing so. Therefore, since Teague was never interposed as a bar to applying Clemons retroactively, Parker, does not represent a case that is dispositive of this case. It has no effect on the decision of the Fifth Circuit holding that Clemons will not to be retroactively applied to cases pending on federal post-conviction review.

Youngblood, is also grounds for allowing this claim to be raised on remand. If a court may raise the claim sua sponte it may allow the defense to be raised at this stage of the proceedings. Petitioner contends that respondent intentionally waived the point when it did not raise Teague in the response to the supplemental brief filed in the first petition for writ of certiorari. We would point out that the Clemons issue was not the subject of the supplemental brief filed by petitioner. The issue raised in the supplemental brief was a claim under the Mills/McKoy precedent. It is hardly appropriate to respond to a claim that is not raised in a supplemental response. Therefore, respondent would

submit that it never waived the claim and that the Fifth Circuit was not in error in allowing the defense to be raised.

Petitioner claims that there is a conflict among the circuits as to the retroactivity of Maynard, as the court below held in Smith v. Black, 904 F.2d 983 n. 14, it is not necessary to determine the application of Maynard to this case. Therefore, while there may be a split among the circuits on this issue the court below did not base its decision on this ground in reinstating the denial of habeas. This is not ground for granting certiorari. Further, petitioner has not shown that there is a conflict among the circuits as to whether or not Clemons is to be applied retroactively.

Petitioner also contends that the Fifth Circuit ignored the mandate of this Court when it did not consider the merits of the claim relating to the "especially heinous" aggravating factor in light of Clemons. Nothing could be further from the truth. The Fifth Circuit considered the claim in light of Clemons and came to the conclusion that Clemons did not apply to the case.

II. Where the State Supreme Court held the claim relating to the "especially heinous" aggravating circumstance to be procedurally barred and this bar was recognized by the United States District Court, the fact that the Court of Appeals addresses the merits of the claim does not waive the bar. The claim remains procedurally barred and therefore certiorari should be denied.

Petitioner next contends that the Fifth Circuit was erred in affirming the denial of habeas relief because of the decision in Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). His reasoning is that since the state court never invoked a harmless error rule in this case the decision is in some way ambiguous. Therefore, the Fifth Circuit could not affirm using a harmless error rule. Petitioner attempts to compare apples and oranges. Harris is used to when a state court's ruling is ambiguous as to whether the issue was decided on state law or federal grounds. It has no application when there is no alternative ground for affirmance given by the state court. There is no ambiguity in the state court's resolution of the issue. The claim was procedurally barred without resort to an alternative ruling. Harris has no application to the actions of a federal court of appeals considering a claim on habeas corpus. Respondent would submit that this claim is procedurally barred.

The State raised the procedural bar before the state court in response to this claim being presented in the state post-conviction petition. The Mississippi Supreme Court imposed a

procedural bar as to the claim. Stringer v. State, 485 So.2d at 275. The state again relied on the procedural default before the district court in response to this issue. Looking to the opinion of the District Court concerning this matter we find the following:

The next issue raised by Petitioner is that the jury's finding of the heinous, cruel and atrocious aggravating circumstances resulted in an arbitrarily imposed sentence. At the outset, the Court notes that this claim is procedurally barred. Stringer, 485 So.2d at 275. Even if this claim were not procedurally barred it is without merit. See Johnson v. Thigpen, 806 F.2d 1243, 1245-49 (5th Cir. 1986).

Stringer v. Scroggy, 675 F.Supp. at 366.

In the brief to the court below the respondent relied on the procedural bar imposed by the state court and recognized by the district court as its answer to this claim.

When the court of appeals considered petitioner's appeal it stated "[b]ecause each of Stringer's points of error is either procedurally barred or without merit, we affirm the district court's denial of the writ." Stringer v. Jackson, 862 F.2d at 111. However, the Fifth Circuit alternatively addressed the merits of the claim without specifically mentioning the bar imposed by the state court or the district court in the discussion of this issue. We submit that the discussion of the merits by the Court below does not invalidate the imposition of the procedural bar. What we have here if anything is an ambiguous ruling by the court of appeals on the issue that can quickly be resolved by looking to the district courts resolution of the issue.

As we pointed out in the court below, appellant had the tools to make the claim at the time of trial and on direct appeal, therefore he cannot be excused from the application of the procedural bar. Therefore even if the Fifth Circuit was in error in its analysis of the merits of this claim, which it was not, the issue is procedurally barred. This Court held in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982):

We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensue that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default. [Emphasis added.]

71 L.Ed.2d at 804.

See: Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Clanton v. Muncy, 845 F.2d 1238 (4th Cir. 1988). This exact claim has been being raised by defense counsel in Mississippi since the enactment of the statutory death penalty scheme. In Washington v. State, 361 So.2d 61 (Miss. 1978); Coleman v. State, 378 So.2d 640 (Miss. 1979); Evans v. State, 422 So.2d 737 (Miss. 1982), Irving v. State, 441 So.2d 846 (Miss. 1983); Edwards v. State, 441 So.2d 84 (Miss. 1983), all cases decided prior to the trial or appeal of the case at bar this claim was raised. This

exact claim had also been litigated by a Mississippi defendant in the federal courts prior to the time of trial or appeal. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983). It is clear that the tools to make the objection to the use of the "especially heinous, atrocious or cruel" aggravating circumstance existed at the time of trial and direct appeal. No claim was raised and the State court made a "plain statement" that the refusal to consider this claim rested on an adequate and independent state procedural rule. Harris. The claim is barred from consideration by the federal courts because petitioner has not shown cause or prejudice to overcome the procedural bar. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The claim remains barred.

While the Fifth Circuit may have made a harmless error analysis as an alternative ruling in this case it is not controlling. The procedural bar is the controlling ruling here. Harris, has no application to this case.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

BY: 

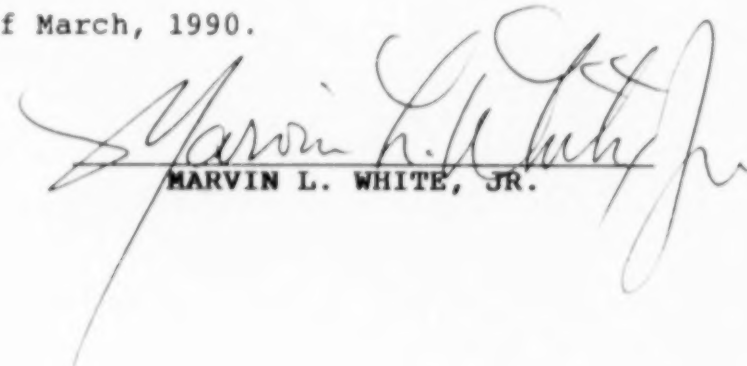
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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above Brief in Opposition to the following:

Kenneth J. Rose, Esquire
Post Office Box 510
Jackson, Mississippi 39205

This the 8th day of March, 1990.


MARVIN L. WHITE, JR.

STATE OF MISSISSIPPI



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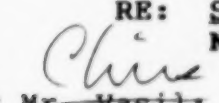
MIKE MOORE
ATTORNEY GENERAL

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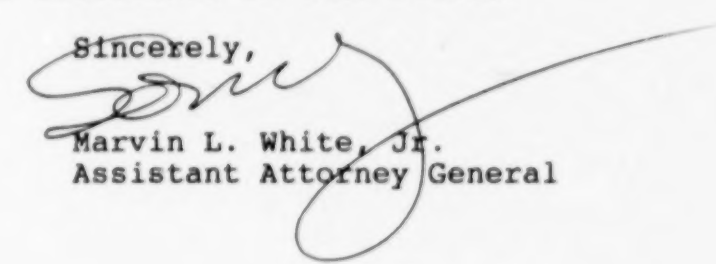
RE: Stringer v. Black
No. 90-6616


Dear Mr. Vasil:

Please find enclosed for docketing and filing in the above captioned cause the original and ten copies of the Brief In Opposition.

Thank you for your assistance in this matter.

Sincerely,


Marvin L. White, Jr.
Assistant Attorney General

MLW/dsm

Enclosures

cc: Honorable Kenneth J. Rose